

The Reach of Rights in the Crisis

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I. Introduction

This chapter explores some central challenges to bringing domestic and international human rights principles to bear on the provision of health care in this pandemic. It looks at the ways in which policy aims to balance a variety of competing rights and demands. Some involve competition for access to scarce resources in hospitals, where the competition might be between possessors of the same right to enjoy the highest attainable standard of health:¹ a gain for one might require a loss for another.² Other situations involve a competition between a human right that might conflict with institutional demands that do not themselves rank as implementing human rights, but are nevertheless demands that are sometimes considered legitimate and which can exercise considerable downward pressure on the ability to give full effect to the human rights in question. This happens in the present pandemic, for example, when orders, backed by the threat of dismissal, are given by some enterprises to their workforces to return to work despite evidence that this return can jeopardise their health. While the enterprise cannot usually claim to be making a human rights-based demand in an order to return to work, there is here a recognisable competition between the right to health and the demand to stimulate the economy.

Downward pressure from a demand that is itself not based on a human right, but is sometimes found to prevail over the claim of right to health, can also arise within the network of a state's international relations. For example, this could happen when a member state of the WTO wants to ban an import on grounds of jeopardy to public health, and the WTO resists the import ban on the grounds that a reasonably available alternative exists that would have a less limiting effect on trade and would also protect health.³

II. Configuring a Human Right When it is Up Against Competition

How can one navigate here? There are several principles that aim to flesh out what it means to “balance” rights against competing claims in these situations. These are the requirement that the purpose behind these limitations not be itself independently

¹ cf *International Covenant on Economic, Social and Cultural Rights*, Art. 12(1).

² cf. Shaheen Azmi, Lorne Foster and Lesley A Jacobs (eds), *Balancing Competing Human Rights in a Diverse Society: Institutions, Policy, Principles* (in cooperation with the Ontario Human Rights Commission) (Irwin Law: 2012). See also, Sheldon Leader, 'Integration, Federation, and the Ethics of Rights', in Monique Costillo (ed), *Morale et politique des Droits de l'homme* (Georg Olms Verlag: 2003) p. 63.

³ Albeit to a possibly lesser extent than would a full ban. Contrast on this issue, Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, GATT decision - November 7, 1990, and Brazil – Measures Affecting imports of re-treaded tyres AB-2007-4. The latter gives greater latitude to a state to fix the level at which it aims to protect public health from the pressures of trade than does the former.

identifiable as illegal,⁴ proportionality,⁵ necessity,⁶ and what is here labelled “reversibility”. The focus here is on the last two: necessity and reversibility. They are particularly relevant to the task of configuring the dimensions of a human right in the circumstances of this health crisis.

a) Necessity

A limitation on the enjoyment of a human right may be imposed if it is established that it is necessary for the purposes of the institution or practice imposing it, and that institution or practice is not otherwise illegal. While there are several interpretations of this requirement, they converge on the need to adjust the limitation on the right against the virtues of allowing that limitation by following a “least negative impact” principle. Courts have asked whether a proposed limitation of a human right arising from a cross-cutting limiting objective is the least damaging to that right from among reasonably available alternatives.

The direction of adjustment is important to note here: it runs from the impact on the right as its benchmark, against which the merits of a proposed adjustment are assessed. So, as in the example of the call to return to work, one should ask if there are reasonably available alternative ways of conducting the return that would have less of an impact on the health of those returning. Via this route, human rights would be applicable in both hiring and firing. The legitimacy of both in this crisis should be anchored in the need to do least damage to the basic rights of those in work, to those wanting work, and to those losing it.

For our purposes, it is important to note that this “least damage” requirement, informing the adjustment between human rights and their legitimate limitation, can actually run in two different directions: it can insist on showing least damage to the human right, or it can insist on showing least damage to the resources and efficacy of the institution aiming to limit that right. Both approaches aim at establishing what they consider to be appropriate space for the human right and appropriate space for the competing objective. But the outcomes of taking one or the other route can be very different. The first will allow the right to be overridden in a narrower range of circumstances than does the second. The first allows a limitation only if it can be shown that the competing objective cannot be reached in any way other than one that places a yet greater limitation on the right. The second does the opposite. It is more open to finding justified limitation on the right and correspondingly greater room for other, competing objectives to prevail.⁷

These competing directions of adjustment are particularly noticeable when institutions with narrower mandates than the state possesses are concerned. When a body such as the

⁴ As would happen, for example, if a hospital intentionally excludes on grounds of their religion, race, etc those who would otherwise receive help.

⁵ This requirement has several components, which include but are wider than necessity. The relevant elements are: i): that the means chosen for achieving an objective that competes with the requirement that one respect the fundamental right in question, be suitable; ii): that the objective be a legitimate one, and; iii): if (i) and (ii) are satisfied, that the means chosen, and/or the objective as interpreted, impinge on the exercise of a fundamental right no more than is necessary. See Sheldon Leader, *Proportionality and the Justification of Discrimination* in Janet Dine and Robert Watt (eds) *Discrimination: Concepts, Limitations and Justifications* (London: Longmans, 1996) 11, and Aharon Barak, *Proportionality* (CUP: 2012).

⁶ See, Aharon Barak, *Proportionality* (CUP: 2012) Ch 11.

⁷ See, Sheldon Leader, ‘Inflating Consent, Inflating Function, and Inserting Human Rights’ in Janet Dine and Andrew Fagan (eds), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation* (Edward Elgar, 2006).

WTO gives priority to facilitating world trade, or a commercial enterprise considers its central mission to engage in profitable production of goods and services, both take measures that can also put pressure on the human rights of those affected, including the right to health, but they are often said to be acting within their mandates in doing so. These mandates, it is often argued, necessarily lead these bodies to reject adjustment in the direction of least negative impact on the human right, even though they may have formally added respect for such rights to their agendas.

b) Hidden priorities

We need to distinguish between *ultimate* priority accorded to a basic right when it faces competition, and priorities in the *adjustment* of that right against the demands of those competitors. Ultimate priority is what one sees when it is clear that the values promoted by, say, the right to health will win over right to trade if one has to choose between them. The right to life is more important than is the right to trade, and more important than the right of investors to their share of corporate profit – more important in the sense that ultimately, if one had to be totally sacrificed to the other, the right to health would win.

However, this ultimate priority is different from the priority that can emerge when the space for the enjoyment of that same right is reduced by asking how it can be adjusted against the requirements of the least negative impact test. A private provider of badly needed medical equipment, for example, might be subject to a government order that it produce this equipment for public use is likely to have several pricing options. One will be to choose a price that puts least burden on the purchasing options of those needing to use the equipment, allowing a larger number to benefit from it, while also making room for the provider to avoid a total loss from the production. An alternative would be for the provider to charge a higher price, making the equipment available to fewer users, but still available to some. The first option looks for the least negative impact on the human right, while the second looks for the least negative impact on commercial returns. Both take some account of the priorities of the other party, but each considers the other to be wrongly focused.

A fully consistent commitment to priority for human rights in this example will line them up in the same direction: it could assign them both ultimate priority *and* priority-in-adjustment. However, these priorities can sometimes be split. A human right might then look as if it has ultimate priority when in fact that status is undermined by a protocol for adjustment that asks: how can we allow a human right to health to be protected in a way that least perturbs, least reduces financial return to investors, or the flow of trade. The right to health, despite appearances, is then marginalised.

c) Reversibility

When two or more human rights compete, there is another issue that arises in public debate about priorities: there is a quality of reversibility about directions of adjustment made between such rights. To illustrate this feature from a domain apart from but relevant to health, consider the right to life as it competes with the right to freedom of movement. Preservation of life is ultimately more important than is the interest in freedom of movement along the highway. But it does not follow that each and every level of risk of death is more important to prevent than is any given level of freedom of movement.⁸

⁸ See, Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, esp. 509-512, 516-18.

For example, evidence might show that the death rate on highways is reduced by a significant but decreasing number for every mile per hour of reduction in permitted speed. Assume that the annual reduction is 2,000 deaths in a given population for a reduction of permitted speed from 100 and 90 mph; a reduction of 1000 deaths if the speed limit drops from 90 to 50 mph; a saving of 100 lives if it falls from 50 to 40, and 10 lives would probably be saved if the speed limit falls from 20 to 5 mph. Even though the preservation of life is ultimately more important than is freedom of movement along the highway, it does not follow that the right to freedom of movement must always be adjusted downwards so as to have the least impact on the death rate. At a certain point a polity may reverse the direction of compromise. In this example, it will at a certain point adjust the attention paid to the risk of death in favour of greater concern for the right to freedom of movement, even though clearly a certain number of reduced deaths will result from a further reduction in speed limit to 5 mph.

This does not mean that the right to life falls out of the picture at all: it still functions to constrain and channel society's obligations to its members. What does happen is that when human rights compete with one another, as does the right to life with the right to freedom of movement, priorities might at some point legitimately shift. The point at which that shift should happen is a potential matter for legislatures, with appropriate coordination from the executive and judiciary. This should help us to further pin down what is involved in moving a human right towards being a central rather than marginal concern for adequate health provision. There may well be points at which a marginal gain in health care is outweighed by a severe loss of resource in other domains of human rights concern. But this throws into relief the situations on the other side of the line, in which the right to health should win out over competing rights.

III. Providers

These points can also indicate a particular challenge in working out the legitimate role for private providers of health care when they are called on to help meet the demands of human rights in this crisis. It is increasingly accepted that human rights principles should be deployed to shape the role of all private commercial enterprises.⁹ This can include acceptance by these enterprises that human rights have what we have called ultimate priority when they compete with other demands on that enterprise.

However, that status can once again be undermined when priorities-in-adjustment come up for consideration. At that point it is quite possible that the private provider sets as a condition for the provision of its service which the government has asked it to provide, that it be able to work with a guideline that makes the least possible negative impact on the right of its shareholders to a return on their investment.

IV. Conclusion

The present crisis brings into focus some longstanding issues. A sharp division between public and private provision of goods and services is increasingly blurred. All are called on, and all are rightly accountable to human rights requirements. At the same time, as these

⁹ UN *Guiding Principles on Business and Human Rights* (Geneva 2011) *passim*.

See, Sheldon Leader, 'Integration, Federation, and the Ethics of Rights', in Monique Costillo (ed), *Morale et politique des Droits de l'homme* (Georg Olms Verlag: 2003) p. 63.

rights extend their reach, their potential can transform into frustration. This is as true of the human right to an adequate standard of health provision as it is true in many other areas of social justice. The questions generated throw into relief the need to appreciate what can be delivered by a full recognition of the central role that human rights can play in this area, rather than a marginal role that they might acquire by default.